SUPREME COURT, U. S.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. 1469

HOMART DEVELOPMENT CO.,
Petitioner,

vs.

ROGER JON DIAMOND, PEOPLE'S LOBBY, INC., AND WILLIAM DUXLER,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. .....

HOMART DEVELOPMENT CO.,

Petitioner,

vs.

ROGER JON DIAMOND, PEOPLE'S LOBBY, INC., AND WILLIAM DUALER,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

APPENDIX A.

Constitutional and Statutory Provisions Involved.

UNITED STATES CONSTITUTION:

Amendment I:

> "Congress shall make no law . . . abridge the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Amendment V:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment XIV:

> "Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATE OF CALIFORNIA PENAL CODE, TITLE XIV, SECTION 602:

> "Every person who willfully commits a trespass by any of the following acts is guilty of a misdemeanor:
>
> • • • • •
>
> (1) Entering and occupying real property or structures of any kind without the consent of the owner, his agent, or the person in lawful possession thereof."

CITY OF SAN BERNARDINO ORDINANCE No. 2491 (September 10, 1968):

> • • • • •
>
> Section 1. . . . Any person, other than a public officer or employee acting within the course and scope of his employment, who enters or remains upon any automobile parking lot, drive-in property or any other place or property open to the public, without the implied or express consent of the owner, his agent or person in lawful possession thereof, or with knowledge that such consent has been withdrawn, is guilty of a misdemeanor. . . .
>
> • • • • •

Section 3. This Ordinance is hereby declared to be for the immediate preservation of the public peace, health and safety and is hereby enacted as an emergency Ordinance to take effect immediately upon its reading in full. A declaration of the facts constituting the urgency is that there is an influx of persons congregating and loitering in malls, parking lots and open areas of drive-ins, shopping centers and business premises who occupy facilities for exceedingly long periods of time. They impede the free flow of passage and prevent the use of business facilities by shoppers. They annoy shoppers and interfere with the work of employees. Upon being requested to move from blocking free passage and upon being requested to relinquish their occupancy of such facilities, they refuse to do so.

That in order to protect the public health, safety and welfare, it is necessary that this Ordinance go into effect immediately to give the owners of such private property and businessmen who own stores and business premises a means to regulate such congregating on and the use by such persons of such private facilities."

APPENDIX B.

OPINION OF THE SUPREME COURT OF CALIFORNIA, DECEMBER 16, 1970.

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA.
In Bank.

ROGER JON DIAMOND et al.,
Plaintiffs and Appellants,
vs.
FRANK BLAND, as Sheriff, etc., et al.,
Defendants and Respondents.

L. A. 29803

(Filed Dec. 16, 1970.)

This appeal from a judgment denying preliminary and permanent injunctions entered in the Superior Court of San Bernardino County presents a constitutional question of first impression in this state: May the owners of a privately owned shopping center deny all use of their premises to persons who desire, on those premises, to engage in First Amendment activities unrelated to the business of the center?

Plaintiffs are People's Lobby, Inc., a nonprofit California corporation, which at the time of the incident giving rise to this litigation was engaged in securing signatures on two anti-pollution initiative petitions, Roger Jon Diamond, attorney for People's Lobby, and William Duxler, a volunteer working for People's Lobby in its initiative campaign. Defendants are Homart Development Company which owns a shopping center in the City of San Bernardino called the Inland Center (Center), the security guard and manager of the Center, the Sheriff and District Attorney

of San Bernardino County, and the Mayor and Chief of Police of the City of San Bernardino.

The Inland Center is located in a nonresidential area on wedge-shaped property bounded by an interstate highway, a commercial street, and a flood control channel. The Center consists of a large parking lot and a totally covered, air-conditioned shopping complex or mall which contains three major department stores—Sears, The Broadway, and The May Company—and 72 single businesses. All of the stores have an unobstructed frontage on the covered "common aisleway." The mall area is surrounded by a six-to eight-foot wide sidewalk which is adjacent to the parking lot.

The covered mall area is open to the public during business hours by means of entry through unlocked doors. Prospective customers are encouraged to visit the mall, which features piped-in music, benches, attractive 32-foot wide common aisleways, and occasional business promotions and displays. No admission is charged for entry to the mall area and no purchases are required as a condition to entry. On the average, 25,000 persons visit the Center every day, coming from a market area of one million people living in places as far from the Center as 75 miles. The Inland Center is the largest shopping center in San Bernardino County.

Under Homart's regulations, all activity apart from regulated, mutually beneficial business promotions and displays, whether by tenants or strangers, is forbidden on the premises of the Center. The policy is intended to avoid any possible congestion or disturbance which might interfere with amiable shopping by customers, and it is applied without discrimination to all varieties of charitable, religious, fraternal, social, and political groups that seek to use the Center's property for any forms of solicitation or discussion.

On October 28 and 29, 1969, representatives of People's Lobby, Inc. requested permission to gather signatures for an initiative petition and to disseminate information in connection therewith on the Center premises. Specifically, Homart was asked to permit plaintiffs to set up a card table in the mall area or on the uncovered sidewalk for the purpose of gathering signatures and distributing leaflets. Plaintiffs assured Homart that their activities would be orderly and would result in no obstruction of normal Center activities. The requests were denied.

On October 30, 1969, two representatives of the People's Lobby, accompanied by a photographer and a newspaper reporter, entered the Center, set up a card table in the mall area, and proceeded to solicit signatures on the petition, collect donations, and distribute literature. Within a few minutes, the Center's security officer approached and demanded that they cease their activities and leave the Center. They complied by moving their table from the mall area to the exterior sidewalk. Again they were ordered to leave, and they did.

The entire occurrence lasted about half an hour during which time numerous persons signed the petitions. There was no disturbance or disruption of the activities of the Center and no departure from the norm of the mall, other than the existence of the table and the gathering of persons around it to sign the petitions, receive related literature, and contribute to the anti-pollution campaign. The trial court found only that the "use sought involved *potential* obstruction and interference with the use of the property." (Italics added.)

No arrests were made as a result of the incident and the representatives of People's Lobby left the Center after the security officer's second demand that they do so. However, all parties agreed that, if plaintiffs had not complied

with the security officer's demand, police assistance would have been requested. The chief of police testified that he would have removed persons from the Center at the request of Homart if they were in violation of any city ordinance or state statute defining trespass. Penal Code section 602, subdivision (1), defines trespass to include "[e]ntering and occupying real property or structures of any kind without the consent of the owner, his agent, or the person in lawful possession thereof." Therefore, the issues raised by the instant case do not differ substantially from those that would have been involved had plaintiffs been arrested upon refusal to leave the Center.

On November 5, 1969, plaintiffs filed a complaint for injunctive and declaratory relief, alleging that defendants' refusal to permit them to use the Inland Center premises to solicit signatures on their initiative petitions and disseminate information in connection therewith was in violation of their constitutional rights under the First and Fourteenth Amendments. The trial court denied a request for a temporary restraining order and, after a hearing, judgment was entered denying preliminary and permanent injunctions.

At the outset, we face a threshold question of mootness. January 26, 1970, was the original deadline for the securing of signatures on plaintiffs' initiative petitions in time for the 1970 election, and, therefore, it might appear at first blush that the case is now moot. However, in briefs both plaintiffs and defendants urge that the case should not be considered moot because of the likelihood of recurrence of conflict between the parties regarding the rights of plaintiffs and others to engage in free speech activities on the property of the Center. (See *Moore* v. *Ogilvie* (1969), 394 U. S. 814, 816; *Eye Dog Foundation* v. *State Board of Guide Dogs for the Blind* (1967), 67 Cal. 2d 536, 541.)

In addition, plaintiffs have filed a new petition with the Secretary of State and have announced resumption of a campaign to qualify an initiative measure for the next state election. Therefore, we find that matter is not moot.

Turning to the merits, it is plaintiffs' contention that applicable case precedent interpreting the First Amendment precludes defendants from absolutely prohibiting on shopping center premises speech activities which may not be absolutely barred from the public streets and parks. We conclude that prevailing authority compels our rejection of the proposition that owners of a shopping center may impose blanket and total prohibition on the exercise of First Amendment activities on shopping center property.

We start from the premise that peaceful and orderly solicitation of signatures, discussion of issues, and distribution of information are First Amendment protected activities which may not be prohibited broadly and absolutely on public streets, parks, and similar public places traditionally associated with the exercise of First Amendment rights. (See *Food Employees* v. *Logan Plaza* (1968), 391 U. S. 308, 313, 315; *Hague* v. *C. I. O.* (1939), 307 U. S. 496.) We must decide whether the Inland Center, because of its private ownership, may insulate itself from such protected activities.

In *Marsh* v. *Alabama* (1946), 326 U. S. 501, the United States Supreme Court determined that the owners of a company town could not prevent the exercise of First Amendment rights on privately owned streets in the business district; therefore, it was held that a member of Jehovah's Witnesses could not be absolutely prohibited from distributing religious literature on the streets of the town. The court recognized that under some circumstances property that is privately owned may be treated as though it were publicly held, at least for First Amendment pur-

poses: "Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it. . . . Whether a corporation or a municipality owns or possesses the town the public in either case has an identical interest in the functioning of the community in such manner that the channels of communication remain free. . . .

"Many people in the United States live in company-owned towns. . . . There is no more reason for depriving these people of the liberties guaranteed by the First and Fourteenth Amendments than there is for curtailing these freedoms with respect to any other citizen. . . . In our view the circumstance that the property rights to the premises where the deprivation of liberty, here involved, took place, were held by others than the public, is not sufficient to justify the State's permitting a corporation to govern a community of citizens so as to restrict their fundamental liberties and the enforcement of such restraint by the application of a state statute." (Fns. omitted.) (*Id.* at pp. 506, 507, 508-509.)

Defendants concede that *Marsh* protected all First Amendment activities on the privately owned streets of the company town, regardless of any special relationship to the business of the town, but they contend that *Marsh* is distinguishable from the instant case which involves a privately owned shopping center and not an entire company town. They assert that in a company town there are no alternative effective channels of communication, while the customers and employees of a shopping center leave it each day and return to communities where they may be exposed to First Amendment communications on public streets, sidewalks, and parks.

It cannot be denied that there are distinctions between a company-owned town and a shopping center with regard to the availability of public property in the surrounding community, but the diferences have been diluted by subsequent United States Supreme Court decisions. In *Food Employees* v. *Logan Plaza* (1968) *supra*, 391 U. S. 308, the court applied the principles of *Marsh* to invalidate a shopping center's blanket prohibition of picketing on its premises. Limiting its holding to the facts before it—union picketing of an employer whose business was located within the shopping center—the court drew broad parallels between the company town in *Marsh* and the shopping center in *Logan*: "The similarities between the business block in *Marsh* and the shopping center in the present case are striking. . . . The shopping center here is clearly the functional equivalent of the business district of Chickasaw involved in *Marsh*.

"It is true that, unlike the corporation in *Marsh*, the respondents here do not own the surrounding residential property and do not provide municipal services therefor. . . . Thus, unlike the situation in *Marsh*, there is no power on respondents' part to have petitioners totally denied access to the community for which the mall serves as a business district. This fact, however, is not determinative. In *Marsh* itself the precise issue presented was whether the appellant therein had the right, under the First Amendment, to pass out leaflets in the business district, since there was no showing made there that the corporate owner would have sought to prevent the distribution of leaflets in the residential areas of the town. . . .

"We see no reason why access to a business district in a company town for the purpose of exercising First Amendment rights should be constitutionally required, while access for the same purpose to property functioning as a business

district should be limited simply because the property surrounding the 'business district' is not under the same ownership." (*Id.* at pp. 317-319.)

The foregoing language clearly indicates that for First Amendment purposes the Supreme Court could see few relevant differences between the company town in *Marsh* and the shopping center in *Logan*.[1] Although the court understandably limited its holding to the facts before it, *Logan* is persuasive authority for the proposition that the right to engage in peaceful and orderly First Amendment activities on the premises of shopping centers should be protected to the same extent as the right recognized by the court in *Marsh* for residents of company towns. The implication is clear from *Logan* that modern-day shopping centers, serving as the business districts for the surrounding residential communities, have important public functions, and their owners may not rely on their private ownership to justify blanket prohibitions on First Amendment activities that could lawfully be conducted on public property. Indeed, in many instances the contemporary shopping center serves as the analogue of the traditional town square.

More recently, in *In re Cox* (1970) 3 Cal. 3d 205, we have had occasion to consider the constitutional implications of the role of the present-day shopping center. We held that a shopping center, like a city, could not engage in arbitrary discrimination on the basis of race, politics or dress in violation of the equal protection clause of the Fourteenth Amendment. We explicitly recognized that "[t]he shopping center has undertaken the public function of providing

1. It is noteworthy that the shopping center in *Logan* was substantialy smaller than the Inland Center. At the time of the litigation in *Logan*, only Sears and Weis Markets, Inc. were located in that shopping center; 15 additional businesses had joined the center at the time of the Supreme Court's decision.

society with the necessities of life and has become the modern suburban counterpart of the town center." (*Id.* at p. 216, fn. 11.) "In undertaking to provide the necessities and amenities of life, the shopping center performs an important public function. . . . Our modern society has become so interdependent and interrelated that those who perform a significant public function may not erect barriers of arbitrary discrimination in the marketplace." (*Id.* at p. 218.)

Finally, in *Tanner* v. *Lloyd Corporation* (D. Ore. 1970), 308 F. Supp. 128, the federal court considered facts almost identical to those before us and, relying on *Marsh* and *Logan,* held that a shopping center could not constitutionally prohibit private persons from distributing handbills within the center mall. "The sole distinction between this case and *Marsh* is that this case involves a shopping center whereas *Marsh* involved a town. I do not believe that distinction should cause a different result. . . . In my view, an owner who opens his land to the general public for business purposes, to the extent that the land becomes the functional equivalent of a public business district, gives up the right to prohibit the distribution of literature. . . . If this were not true, the public need for uncensored information, on which *Marsh* was based, could be frustrated." (*Id.* at p. 132.)[2]

Thus, the rationale of *Marsh,* plus the analogy drawn between the company town and the shopping center by *Logan* and related cases, compel a decision to grant injunctive and declaratory relief. But we need not rely solely on the foregoing approach; additional instructive precedent

2. Defendants also attempt to distinguish *Marsh* by insisting these plaintiffs can assert their First Amendment rights by means of mass media. It seems evident that mass media are particularly inappropriate for plaintiffs' purposes: no one has suggested how signatures can be obtained on initiative petitions by means of newspapers, radio or television.

supports plaintiffs' request for protection of their First Amendment rights.

In *Logan,* the Supreme Court held that a shopping center could not absolutely prohibit union picketing of a business located within the Center. The court expressly declined to decide whether "respondents' property rights could, consistently with the First Amendment, justify a bar on picketing which was not thus directly related in its purpose to the use to which the shopping center property was being put." (391 U. S. at p. 320, fn. 9.) In *Schwartz-Torrance Investment Corp.* v. *Bakery & Confectionery Workers' Union* (1964), 61 Cal. 2d 766, we reached an identical result four years prior to the Supreme Court decision in *Logan.* Striking a balance between the interests of union members in picketing an employer and the desire of the owners of the center to prohibit peaceful picketing, we held that the owner of a shopping center could not enjoin as a trespass the peaceful picketing by union members of premises in the center leased by the owner to the employer of the union members. Most recently, in *In re Lane* (1969), 71 Cal. 2d 872, we extended the principles of *Logan* and *Schwartz-Torrance* to the privately owned sidewalk in front of a large supermarket and held that unobstructive union picketing and handbilling on the sidewalk were protected under the First Amendment as against the property rights of the owner-employer.

This series of cases involving union picketing in shopping centers establishes constitutional protection for picketing and other First Amendment activities which are related in their purpose to the normal use to which the shopping center property is devoted. A logical query then arises as to whether these cases provide an additional source of authority in support of plaintiffs' right to solicit signatures and distribute information within the Inland Center. Defendants contend that *Logan, Schwartz-Torrance,* and *Lane*

are clearly distinguishable from the instant action because the First Amendment activity conducted by plaintiffs here was not directly related to the purposes for which the Inland Center properties were being used.

Indisputably, defendants have isolated a relevant difference between the precedents and the instant case, but the question remains whether the difference justifies the holding of the trial court that defendants are free to prohibit all nonbusiness-related First Amendment activities on their premises. Both *Schwartz-Torrance* and *Logan* did rely in part on the fact that the unions involved were picketing businesses located within the shopping centers, but that circumstance was relevant only because it strengthened the interest of the petitioners in their exercise of the First Amendment activities inside the shopping centers. When the activity to be protected is the right to picket an employer, the location of the employer's business is often the only effective locus; alternative locations do not call attention to the problem which is the subject of the picketing and may fail to apply the desired economic pressure.

Plaintiffs in the instant case cannot claim that effective alternative sites for their First Amendment activities are unavailable. If plaintiffs are barred from circulating their initiative petitions in the Inland Center, they are free to do so on the public streets and sidewalks in the surrounding community. Nevertheless, it is clear that they have a substantial interest in being able to solicit signatures and distribute information at the Center. Access to the thousands of persons who congregate on foot daily at the Center is a highly significant vehicle for the dissemination of ideas, particularly when the activity requires time for discussion and a place for obtaining signatures. The Inland Center serves as the primary business district for a large surrounding community and is the most effective and desirable

location for the conduct of plaintiffs' First Amendment activities.

To be balanced against the interest of plaintiffs in the exercise of their First Amendment rights at the Center is the interest of defendants in the complete prohibition of nonbusiness-related activities. Language in *Schwartz-Torrance, Logan,* and *Lane* defines the scope of the property interest possessed by the owners of shopping centers and is no less applicable to defendants in the case at bar. In *Schwartz-Torrance,* we stated: "[T]he countervailing interest which [the owner] endeavors to vindicate emanates from the exclusive possession and enjoyment of private property. Because of the public character of the shopping center, however, the impairment of [the owner's] interest must be largely theoretical. [The owner] has fully opened his [*sic*] property to the public. . . . [It] suffers no significant harm in the deprivation of absolute power to prohibit peaceful picketing upon property to which it has invited the entire public. . . . The Supreme Court of the United States in *Marsh* . . . describes the diluted nature of a property right in premises opened to the public." (61 Cal. 2d at p. 771.) We concluded, "the interest of the [owner] lies in the shadow cast by a property right worn thin by public usage." (*Id.* at pp. 774-775.)

The Supreme Court in *Logan* used similar language to describe the property interest of the owners which was to be balanced against the union's interest in the exercise at the center of its First Amendment rights: "The sole justification offered for the substantial interference with the effectiveness of petitioners' exercise of their First Amendment rights . . . is respondents' claimed absolute right under state law to prohibit any use of their property by others without their consent. However, unlike a situation involving a person's home, no meaningful claim to protection of a right of privacy can be advanced by respondents

here. Nor on the facts of the case can any significant claim to protection of the normal business operation of the property be raised. Naked title is essentially all that is at issue." (391 U. S. at p. 324.) In *Lane,* we quoted from *Logan* and balanced the "naked title" of the owners of the supermarket against the "paramount and preferred place given to the First Amendment freedom of speech right in our democratic system. . . ." (71 Cal. 2d at p. 878.)

Therefore, although there is arguable merit to defendants' position that plaintiffs' interest in the exercise of their First Amendment rights at the Center may be less compelling than the First Amendment interests involved in *Schwartz-Torrance, Logan,* and *Lane,* their contention does not justify striking the balance in favor of defendants' property rights. As we have explained, plaintiffs' interest is of significant constitutional dimension, while defendants' concern is no stronger than the interests of the property owners in *Schwartz-Torrance, Logan,* and *Lane.* There is no allegation that the plaintiffs' conduct was in any way disruptive of the business activities carried on at the Center; and the trial court's finding of a "potential obstruction and interference with the use of the property" does not justify a blanket bar on all First Amendment activities, but merely suggests reasonable regulation of those activities.

The foregoing analysis indicates that we may not ignore the impact of *Schwartz-Torrance, Logan,* and *Lane* solely because those cases involved First Amendment activities related to the purposes for which the affected properties were being used. Furthermore, there is persuasive California authority which rejects the tests relied on by defendants to distinguish *Schwartz-Torrance, Logan,* and *Lane* from the case at bar. *In re Hoffman* (1967), 67 Cal. 2d 845 involved the constitutionality of a municipal ordinance which limited permissible activities in railway stations to

those related to railroad business. We held that the ordinance could not be applied, consistently with the First Amendment, to prohibit defendants from peacefully distributing antiwar leaflets at Union Station in Los Angeles, a privately owned railway station. In reaching this result, we expressly rejected the city's contention that the station could be limited to railroad-related uses so long as defendants were able to disseminate their views at alternative locations. "The primary uses of municipal property can be amply protected by ordinances that prohibit activities that interfere with those uses. Similarly, the primary uses of railway stations can be amply protected by ordinances prohibiting activities that interfere with those uses. In neither case can First Amendment activities be prohibited solely because the property involved is not maintained primarily as a forum for such activities. . . .

"Similarly in the present case, the test is not whether petitioners' use of the station was a railway use but whether it interfered with that use. . . . Noise and commotion are characteristic of the normal operation of a railway station. The railroads seek neither privacy within nor exclusive possession of their station. They therefore cannot invoke the law of trespass against petitioners to protect those interests. . . .

"Had petitioners in any way interfered with the conduct of the railroad business, they could legitimately have been asked to leave. . . . It is immaterial that another forum, equally effective, may have been available to petitioners. . . . Absent the presence of some conflicting interest that could be protected in no other way, petitioners have the right to choose their own forum." (*Id.* at pp. 850, 851, 852 and fn. 7.)

Hence, in *Hoffman* we held that the bare title of the owners of the railroad station was not a sufficient interest

to outweigh the interest of petitioners in the exercise of First Amendment rights at the station. We reached that conclusion even though the particular speech activities involved were not directly related to the normal uses of the affected business property. (See also *Wolin* v. *Port of New York Authority* (2d Cir. 1968), 392 F. 2d 83; cf. *Burnside* v. *Byars* (5th Cir. 1966), 363 F. 2d 744.)

Defendants would have us distinguish *Hoffman* on the ground that the potential for obstruction and interference occasioned by the exercise of unrelated First Amendment rights in a shopping center is much greater than that potential in a railway station. They contend that the normal functioning of business in a shopping center demands a more rigid standard of order and tranquility than the business activities at railway stations, up to recent years characterized by noise and commotion. Therefore, they conclude that their interests in prohibiting activities unrelated to business in the Inland Center are greater than the concerns of the owners of Union Station.

Though debatable, it may be conceded that a large shopping center is not likely to be as noisy, crowded, or active as the railway station in *Hoffman*, but the difference is one only of degree. Certainly, a shopping center does not require the same perfect order, silence, and contemplative environment as, for example, a public library or courthouse. A shopping center to which the public is invited and where thousands of persons come to shop, browse, stroll, and talk is no more likely to be disrupted by peaceful and orderly circulation of a petition than a railway station; and the business of a railway station, as much as that of a shopping center, can be disrupted by *unregulated* First Amendment activity, whether that activity is related or unrelated to the uses of the affected property. Thus the owner of a shopping center, like the owner of a railway station, has no

legitimate interest in absolutely prohibiting all First Amendment activities on his premises.

It bears repeating that no evidence was presented to the trial court that plaintiffs' activities actually interfered with the normal business operations of the Inland Center.[3] Plaintiffs do not contend that they are entitled to use private property for the dissemination of ideas without limitations imposed by reasonable regulations designed to protect the business activities of the Center. Each of the cases upon which we rely—*Marsh, Logan, Schwartz-Torrance, Lane,* and *Hoffman*—presumed that the property owners involved were free to impose "reasonable regulations" upon the exercise of First Amendment rights on their premises; and each of the cases emphasized that disruptive First Amendment activities may be prohibited by the owners of private property opened to the public.

We impose no unrealistic burden on the operators of shopping centers in insisting that their control over First Amendment rights be exercised, if at all, through reasonable regulations calculated to protect their business interests rather than through absolute bans on all non-business-related activities. Shopping centers, like railway stations, are not incapable of regulating permissible activities. If regulations could not be designed, the decisions in *Schwartz-Torrance* and *Logan* might have produced chaos, as labor unions and other groups would have been free to picket businesses in the shopping centers without reasonable limitation as to time, place, or manner. Moreover, the trial court findings in the instant action demonstrate the ability of Inland Center to regulate the various sales pro-

3. The "obstruction" in this case is comparable to that involved in *In Re Wallace* (1970), 3 Cal. 3d 289, 295.

motions and displays that are permitted in the common aisleways: "In every instance where a promotion is held, it is closely regulated as to time, date, location, number of people or exhibits involved, manner of presentation and security factors." Similar regulations, if not repressive in scope, can be devised to protect Inland Center from actual or potential danger of First Amendment activities being conducted on its premises in a manner calculated to disrupt normal business operations and to interfere with the convenience of customers.

We conclude that the line of cases beginning with *Marsh* and including *Schwartz-Torrance*, *Logan*, *Lane*, and *Hoffman* compels a reversal of the judgment rendered by the trial court and entitles plaintiffs to a judgment confirming their right to circulate initiative petitions and to engage in other peaceful and orderly First Amendment activities on the premises of the Inland Center[4] and declaring that defendants may not constitutionally impose a prohibition on all First Amendment activity on the premises of their shopping center. Unless there is obstruction of or undue interference with normal business operations, the bare title of the property owners does not outweigh the substantial interest of individuals and groups to engage in peaceful and orderly First Amendment activities on the premises of shopping centers open to the public.

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4. Although the parties have not raised the issue, we have not overlooked consideration of the concept of state action. It is elementary constitutional doctrine that the First and Fourteenth Amendments protect individuals only from state action which inhibits their free speech rights. Here we find state action of a character comparable to that in *Logan*, *Schwartz-Torrance*, and *Lane*. We explained in *In re Cox* (1970), supra, 3 Cal. 2d 205, 217 fn. 11: "In *Logan Valley*, *Lane and Schwartz-Torrance*, the United States Supreme Court and this court found 'state action' under the Fourteenth Amendment in a shopping center's refusal to permit the exercise of First Amendment rights in such public areas as sidewalks, parks, and malls."

The judgment is reversed and the trial court is directed to enter judgment for plaintiffs consistent with the views expressed in this opinion.

MOSK, *J.*

We concur:

WRIGHT, *C. J.*
PETERS, *J.*
TOBRINER, *J.*
BURKE, *J.*
SULLIVAN, *J.*

Diamond v. *Bland*
L. A. 29803

DISSENTING OPINION BY MCCOMB, *J.*

I dissent. I would affirm the judgment for the reasons expressed by Mr. Justice Gardner in the opinion prepared by him for the Court of Appeal in *Diamond* v. *Bland* (Cal. App.), 87 Cal. Rptr. 97.

MCCOMB, *J.*

APPENDIX C.

OPINION OF THE CALIFORNIA COURT OF APPEALS, MAY 25, 1970.

COURT OF APPEAL, FOURTH DISTRICT.

Second Division

State of California

ROGER JON DIAMOND, et al.,
Plaintiffs and Appellants,
vs.
FRANK BLAND, SHERIFF OF SAN BERNARDINO COUNTY, et al.,
Defendants and Respondents.

4 Civil 10084

OPINION.

(Filed May 25, 1970.)

APPEAL from a judgment of the Superior Court in and for the County of San Bernardino. James E. Cunningham, Sr., Judge. Affirmed.

Roger Jon Diamond for Plaintiffs and Appellants.

Lonergan, Jordan & Gresham, and Allen B. Gresham, for Defendants and Respondents Homart Development Company, James Lambert and C. H. Barrett.

Stanford D. Herlick, County Counsel, and Paul A. Grube, Jr., Deputy County Counsel, for Defendants and Respondents Frank Bland and Lowell E. Lathrop, Sheriff and District Attorney, respectively, of San Bernardino County.

Ralph Prince, City Attorney, for Defendants and Respondents Mayor Al C. Ballard and Chief of Police Louis J. Fortuna of the City of San Bernardino.

Lawrence M. Cohen, by comity, for Defendants and Respondents.

This is an appeal from a judgment denying preliminary and permanent injunctions entered in the Superior Court of San Bernardino County.

All parties agree that this is a case of first impression. It presents the following constitutional question: May the owners of a privately owned shopping center deny the use of their premises to those who desire to use those premises for First Amendment purposes and activities unrelated to the business of the center?

We hold that they may.

Plaintiffs are People's Lobby, Inc., a non-profit California corporation, which at the time of the incident giving rise to this litigation was engaged in securing signatures on two anti-pollution initiative petitions; Roger Jon Diamond, attorney for People's Lobby, Inc; and William Duxler, a volunteer petition carrier for People's Lobby, Inc.

Defendants are Homart Development Company which owns and operates a shopping center in the City of San Bernardino known as the Inland Center; C. H. Barrett, its security guard; James Lambert, its manager; the Sheriff and District Attorney of San Bernardino County and the Mayor and Chief of Police of the City of San Bernardino.

The Inland Center is located in a non-residential area and is bounded by a drainage channel, a six-lane interstate highway and a commercial street. In industry parlance, it is a "regional fashion center" which connotes a shopping center with only "top line stores" which services a large

geographical area. It contains a large parking lot, a totally covered, air-conditioned shopping complex which consists of three major stores—Sears, The Broadway and The May Company—and sevently-two "tenant stores" all of which have an unobstructed front on the covered "mall" or "common aisleway." The complex is surrounded by a six to eight foot wide sidewalk. Adjacent to the sidewalk are heavily traveled driveways and the parking lot.

The covered mall area is open during business hours to customers or those other doing business with the Center by means of entry through unlocked doors. Homart encourages customers to visit the mall in anticipation of increased sales for the tenant shops. It furnishes piped-in music, receptacles and benches on the thirty-two foot wide common aisleways. It forbids the tenant stores from engaging in sales or other activities on the mall aisleways and spends, along with the tenant stores, considerable sums of money to make the mall an attractive and convenient place for customers. Customers are also encouraged to come to the Center by means of promotions and generally unmanned displays conducted in the mall area pursuant to contractual arrangements and closely regulated by Homart as to time, date, location and format.

Under Homart's regulations *all* activity apart from such regulated, mutually beneficial promotions and displays, whether by tenants or strangers, is forbidden on the common aisleways of the mall area. This policy is an integral part of Homart's objective to create a pleasant and attractive area for customers to shop without congestion or interference. This policy is well established and enforced without discrimination. Pursuant to this policy, although the center receives many calls from all varieties of religious, charitable, fraternal and political groups who seek permission to use the Center property, all such forms of solici-

tation, distribution of material and like activity are and have been prohibited on the Center property.

Twenty-five thousand persons per day on the average shop and visit Inland Center. Persons visiting the Center customarily arrive by motor vehicle, drive into the parking lot which has passage ways governed by motor vehicle traffic regulations. At each entrance to the parking lot are "no trespass" signs indicating that it is private property and admission is subject to revocation.

On October 28 and 29, 1969, representatives of Inland Center were asked by representatives of People's Lobby, Inc. for permission to gather signatures for their initiative petition and disseminate information in connection therewith. Although a request for use of the mall area was made, Homart was also asked if the uncovered six to eight foot sidewalk between the structural and the parking lot areas could be used. Both requests were denied. Appellants advised Homart that their activities would be orderly and that they would not obstruct anything although they would like to use a card table to gather signatures, but Homart still rejected their request.

On October 30, 1969, at approximately 7:45 p.m., Duxler and another individual representing People's Lobby, together with a newspaper reporter and a photographer whom Duxler had requested to be present, entered the Center, went into the mall area and set up a standard size card table. There they proceeded to solicit signatures on the initiative petition, disseminate information with regard thereto, pass out bumper stickers, collect donations in a contribution container and affix a sign describing their purpose to the Center directory.

Shortly thereafter, Mr. Barrett, the security officer, observed a crowd of people congregating in the mall and proceeded to investigate the reason therefor. After as-

certaining that Duxler and the other individuals were acting without permission, he requested that they cease their activity and leave the Center. They took down their card table, discontinued their activities and left the mall area, only to resume their activities on the exterior sidewalk. Again, Barrett requested they leave and this time they did.

The entire transaction lasted about half an hour during which time numerous persons signed the petitions. Other than the existence of the table and the activities of Duxler and the other individuals in securing the signatures on the initiative petitions, there was no "disturbance" or "disruption" in the usual sense of the use of those words. Everyone behaved admirably.

While no threat of prosecution was made nor was anyone arrested, the testimony is clear that if plaintiffs had not complied with Barrett's request, he would have reported the matter to Lambert, the Center manager, who, in turn, would have requested police assistance. The Chief of Police, in turn, testified that had his office been called upon, he would have removed persons from the Center at the request of Homart if they were in violation of the City Trespass Ordinance or a State Penal Code section defining trespass.

There were alternative means and locations whereby plaintiffs could have accomplished their desired objectives without utilizing the private property of the Center. The solicitation could have been undertaken on public sidewalks, in public parks, at public buildings, and at entertainment and sporting events. Other communication with the public admittedly could have been had through newspaper media, radio, television, telephone, door-to-door contact, bumper stickers and mailings. However, appellants contend, and we feel that the record substantiates the con-

tention, that these methods are not as desirable or as effective as the use of a shopping center or mall where the public congregates in large numbers on foot.

On November 5, 1969, appellants filed a complaint for injunctive relief (which contained a prayer for declaratory relief) alleging that respondents' refusal to permit them to use the Inland Center premises to solicit signatures on their initiative petitions and disseminate information in connection therewith was in violation of their constitutonal rights. A request for a temporary restraining order was denied, and, after a hearing on November 14, 1969, the request for a preliminary injunction was also denied. The parties then stipulated that the order of the trial court denying the preliminary injunction should also apply to the request for a permanent injunction and a judgment was entered accordingly on December 5, 1969. Notice of appeal was filed by appellants in this court on December 8, 1969.

A threshold question of mootness presents itself.

The parties urge and we agree that the case is not moot.

January 26, 1970, was the deadline for the securing of signatures for plaintiffs' initiative petition. The findings and judgment of the trial court were entered on December 5, 1969. Thus, when the case was before that court, the issues were clearly not moot. However, the time has now passed for the securing of additional signatures and at first blush it would appear that the case is now moot.

Generally, an action which originally was based upon a justiciable controversy cannot be maintained on appeal if all the questions have become moot by subsequent acts or events. The appeal should be dismissed. The reason for this rule is that a reversal in such a case would be without practical effect. (*Eye Dog Foundation* v. *State Board of Guide Dogs for the Blind,* 67 Cal. 2d 536; *Consolidated*

Vultee Aircraft Corp. v. *United Auto etc. Workers,* 27 Cal. 2d 859; *Nomm* v. *Nomm,* 164 Cal. App. 2d 663.)

However, the parties have filed with this court a joint declaration in which they both submit that the case should not be considered moot. In support of this contention, plaintiffs allege that they are presently seriously contemplating other similar campaigns and regard access to Homart's property and that of other similarly situated shopping centers to be essential thereto. In turn, Homart alleges that the Inland Center has frequently been approached by various people seeking to engage in solicitation and related activities, and contends that it can reasonably be anticipated that not only the plaintiffs but numerous other groups will seek to engage in similar activities in the future. Thus, the parties urge that a recurrence of plaintiffs' October 30, 1969 conduct may reasonably be anticipated in the future. Plaintiffs reasonably believe that if they do so, Homart will impose on them what they consider to be an unconstitutional impediment on their exercise of First Amendment free speech rights. On the other hand, Homart reasonably believes that if the plaintiffs press forward with their planned program, it would be placed in the dilemma of either ejecting them as it did in the instant case and thus become subject to similar litigation or doing nothing and thus being deprived of what it believes to be its Fifth Amendment property rights.

Under certain conditions Appellate Courts may entertain a case which subsequent events appear to have made moot. Some of the criteria for this exception to the rule of mootness are:

(1) There is a reasonable likelihood of the same problem recurring between the same two parties giving rise to future litigation on the same subject.

(2) There remain material questions for the court's determination.

(3) Underlying questions persist.

(4) The relief prayed for may encompass future and contingent legal rights.

(5) The parties agree that a finding of mootness would necessitate future litigation, i.e., that a finding of mootness would relegate the parties to the very situation which precipitated the present litigation, a development creating a continuing controversy calling for decision.

(6) That it is likely that the continuing controversy would never be decided on appeal because of the limited time involved in the questioned activity.

(7) That the controversy involves a question of great public interest.

(*Moore* v. *Ogilvie,* 394 U. S. 814 [23 L. Ed. 2d 1, 89 S. Ct. 1493]; *Carroll* v. *President and Commissioners of Princess Anne,* 393 U. S. 175, 178-179 [21 L. Ed. 2d 325, 89 S. Ct. 347]; *Eye Dog Foundation* v. *State Board of Guide Dogs for the Blind, supra,* 67 Cal. 2d 536; *County of Madera* v. *Gendron,* 59 Cal. 2d 798; *Di Giorgio Fruit Co.* v. *Department of Employment,* 56 Cal. 2d 54; *Rattray* v. *Scudder,* 28 Cal. 2d 214; *Jordan* v. *County of Los Angeles,* 267 Cal. App. 2d 794; *Kirstowsky* v. *Superior Court,* 143 Cal. App. 2d 745.)

While all of the above criteria need not exist for a finding against mootness, it is obvious that in this case each of the standards listed do apply. Therefore, we hold that this case is not moot.

Turning to the merits of the case, appellants contend that under applicable case law, they can conduct on respondents' mall and on its sidewalks, driveways and parking lot whatever First Amendment protected activities they could on the public streets of a city—in this case solicit signatures for their petition, disseminate information and collect donations.

Respondents reply that appellants can have the unconsented use of respondents' property only if the manner and purposes sought are consistent with the use to which the property is actually put and then only when there are no alternative effective means of communication readily available.

For an answer to these contentions, it is necessary to trace in some detail the legal history of the use of privately owned shopping centers for First Amendment purposes.

One is first met with the somewhat vague but widely used expression that public streets, highways and parks have been "traditionally" or "from time immemorial" the place for the exercise of First Amendment rights of free speech. However, as Chief Justice Traynor pointed out in *In re Hoffman,* 67 Cal. 2d 845 at 849, the "time immemorial" from which streets and parks had been required to be held open for First Amendment activities really dates from 1939, with the case of *Hague* v. *CIO,* 307 U. S. 496 [83 L. Ed. 1423, 59 S. Ct. 954]. In that case the Supreme Court determined that First Amendment activities on public streets, sidewalks, and parks could be regulated only to the extent necessary to prevent interference with the municipality's interest in protecting the public health, safety or order or in assuring the efficient and orderly use of streets and parks for their primary purpose. The difficulty of fashioning a workable set of rules for even this concept of the exercise of First Amendment rights on public property has produced a number of decisions which have divided the court. (See *Adderley* v. *Florida,* 385 U. S. 39 [17 L. Ed. 2d 149, 87 S. Ct. 242]; *Brown* v. *Louisiana,* 383 U. S. 131 [15 L. Ed. 2d 637, 86 S. Ct. 719]; *Cox* v. *Louisiana,* 379 U. S. 536 [13 L. Ed. 2d 471, 85 S. Ct. 453]; *Edwards* v. *South Carolina,* 372 U. S. 229 [9 L. Ed. 2d 697, 83 S. Ct. 680]; *Jamison* v. *Texas,* 318 U. S. 413

[87 L. Ed. 869, 63 S. Ct. 669]; *Schneider* v. *New Jersey,* 308 U. S. 147 [84 L. Ed. 155, 60 S. Ct. 146].)

Then in 1946 the United States Supreme Court extended this principle to a company-owned town in *Marsh* v. *Alabama,* 326 U. S. 501 [90 L. Ed. 265, 66 S. Ct. 276]. In *Marsh,* all the property interests in the town were held by a single company. However, the town did not function differently from any other town. It consisted of residential buildings, streets, sidewalks, a system of sewers, a sewage disposal plant and a business block in which business places were situated. All were owned by the company. A deputy sheriff, paid by the company, acted as the town's policeman. Merchants and service establishments rented the stores and business places in the business block and the United States Government maintained therein a post office from which mail was delivered to the people of the town. "In short the town and its shopping district are accessible to and freely used by the public in general, and there is nothing to distinguish them from any other town and shopping center except the fact that the title to the property belonged to a private corporation." (*Marsh* v. *Alabama, supra,* 326 U. S. 501, 503 [90 L. Ed. 265, 66 S. Ct. 276, 277].)

Appellant, a Jehovah's Witness, was distributing religious literature on a sidewalk in the business block. She was told to leave, refused, was charged with and convicted of trespass. The Supreme Court reversed the conviction holding that in such a company-owned town appellant's First Amendment rights were the same as though she had been pursuing those rights on a publicly owned sidewalk. The reasoning in *Marsh* is clear. Since *all* of the property was owned by the company, *any* use of the company-owned streets and sidewalks was the equivalent of engaging in such activity on publicly owned streets and sidewalks in an ordinary town. In other words, it was held to

be proper to carry out *any* First Amendment protected activities on the privately owned streets of a company-owned town that could be carried out on the publicly owned streets of an ordinary town. While the language of the case does not use the exact expression "the lack of alternative effective means of communication," the facts of the case and the holding make it clear that this concept loomed large in the opinion. In a company-owned town there are no alternative effective means of man-to-man communication—by word of mouth, handbills, placards, etc. Were the company-owned town to deny *all* First Amendment rights on its streets and public places, the inhabitants would have nothing but radio, television (not very potent in 1946), mail and newspapers (assuming the landowner allowed newspaper sales and delivery) by which communication on matters of public interest could be brought to the attention of the inhabitants.

Then in 1964 the Supreme Court of this State decided the landmark case of *Schwartz-Torrance Investment Corp.* v. *Bakery and Confectionery Workers' Union,* 61 Cal. 2d 766. In this case, the court held that the owners of a shopping center could not enjoin as a trespass a union's peaceful *picketing* of premises leased by an employer from the owners of the shopping center. The court concluded that the union's interest in picketing outweighed the property owner's interest in "vindicating a theoretical invasion of its right to exclusive control and possession of private property." (*Schwartz-Torrance Investment Corp.* v. *Bakery and Confectionery Workers' Union, supra,* 61 Cal. 2d 766, 772.)

While *Schwartz-Torrance* cited *Marsh* for the general principle of "the diluted nature of a property right in premises open to the public" (*Schwartz-Torrance, supra,* p. 771), the case was decided primarily upon labor relations law and on a public policy favoring concerted activities of

employees for the purpose of collective bargaining. (Labor Code, § 923; *Messner* v. *Journeymen Barbers etc. International Union*, 53 Cal. 2d 873; *Shafer* v. *Registered Pharmacists' Union*, 16 Cal. 2d 379.) The preferential status of picketing under our laws weighed heavily with the court in *Schwartz-Torrance*. In other words, *Schwartz-Torrance* was and is a *picketing* case and the language of that case should not be extended beyond the factual situation presented therein.

The case in which appellants place their primary trust is *Amalgamated Food Employees' Union, Local 590* v. *Logan Valley Plaza, Inc.*, 391 U. S. 308 [20 L. Ed. 2d 603, 88 S. Ct. 1601], decided in 1968. Here the principles of *Marsh* were extended from a company-owned town to an ordinary shopping center *in a picketing case*. The court held that for the purposes of that case an ordinary shopping center was the functional equivalent of a community business block and for First Amendment purposes *as reflected by picketing and handbilling in a labor dispute involving places in the shopping center*, it was to be treated in the same manner.

However, *Logan Valley* specifically failed to resolve the question of whether it was necessary that First Amendment protected activities to be carried out on a shopping center have a causal connection or be directly related to the purpose to which the shopping center property was being put. The court stated (391 U. S. at p. 319, 88 S. Ct. 1609), "All we decide here is that because the shopping center serves as the community business block 'and is freely accessible and open to the people in the area and those passing through,' *Marsh* v. *State of Alabama*, 326 U. S. at 508, 66 S. Ct. at 279, the State may not delegate the power, through the use of its trespass laws, wholly to exclude those members of the public wishing to exercise their First Amendment rights on the premises *in a manner and for a purpose*

generally consonant with the use to which the property is actually put." [Emphasis added.] The court follows that statement with footnote 9 on the same page, which reads: "The picketing carried on by petitioners was directed specifically at patrons of the Weis Market located within the shopping center and the message sought to be conveyed to the public concerned the manner in which that particular market was being operated. We are, therefore, not called upon to consider whether respondents' property rights could, consistently with the First Amendment, justify a bar on picketing which was *not thus directly related in its purpose to the use to which the shopping center property was being put.*" [Emphasis added.]

In 1969, the Supreme Court of this State in *In re Lane*, 71 A. C. 911, *a picketing case,* carried the *Logan Valley* principle a step further and extended First Amendment rights insofar as picketing and a labor dispute were concerned, to a privately owned sidewalk which led to an individual store but which sidewalk was held open to access by the public.

The most recent case in this field before the Supreme Court of the United States is *Taggart* v. *Weinacker's, Inc.*, 90 S. Ct. 876 (March 9, 1970), which casts little light on the subject of this case. This also was a *picketing* case involving a shopping center but the decision did not discuss the general problem, merely concluding that in the light of an obscure record, the physical circumstances of the narrow sidewalk involved, the finding of the state court on obstruction of customers, coupled with the fact that only a bare remnant of the original controversy remained, that the writ should be dismissed as improvidently granted.

It is to be noted that each of the above cases, excluding *Marsh,* was a *picketing* case. In each case there was an activity being carried on which was consistent with and

directly related to the primary use to which the property was being put. In each of these cases there was an effort to communicate by a particular group to a particular group at a place which represented the object of protest and in each case the area selected presented the most effective point of persuasion. In *Marsh,* of course, full First Amendment rights were granted on the streets and sidewalks of a town which was wholly owned by a company as there was absolutely no place in that town in which First Amendment activities of any nature could be carried on without the consent of the landowner.

To bring the appellants in the presment case within the protection and under the umbrella of the above cases, we must either find under the *Marsh* theory that a shopping center has *all* of the attributes of a company-owned town, or under *Logan Valley, Schwartz-Torance, Lane* and *Taggart* that the activities of the appellants were consistent with and directly related to the purpose and use to which the property was actually being put.

Turning first to the *Marsh* concept:

Shopping centers are an historical and logical extension of a process which began when supermarkets and department stores developed. In the supermarket concept, grocery stores, butcher shops, bakeries, green grocers, tobacconists, liquor stores and delicatessens all combined under one roof for the convenience of customers and eventually dispensed practically every commodity attractive to the shopper, including sundries and dry goods. At the same time there was developing the department store concept in which small shops which sold ladies' dresses, men's haberdashery, cosmetics, jewelry, luggage, perfume, hardware, appliances, yardage goods, toys, sporting equipment, and furniture again combined for the convenience of the shopper under one roof. Finally, because we had become

an automobile oriented culture, all of these were brought together in the modern shopping center—some vast in size and concept such as the Inland Center, but mostly small and centered around a supermarket.

But large or small, a shopping center is not a town. Inland Center covers many acres. It caters to thousands of people each day, but large as it is, it is not a town. While the general language of *Logan Valley* clothes it for picketing purposes with the garb of "the functional equivalent of the streets and sidewalks of a normal business community," this is a legal fiction. One does not spend one's whole life in a shopping center as one may in a town, company or otherwise. The customers and employees of a shopping center leave it each day to return to "town" where they may properly be exposed to First Amendment communications on public streets, sidewalks and parks. It would be unreasonable to enlarge the company-town concept of *Marsh* to a shopping center for all First Amendment rights regardless of the size of the shopping center. The rationale of *Marsh* discussed above simply does not fit a shopping center.

Thus, the real question presented is, are the activities of the appellants consistent with and directly related to the primary purpose and use to which respondents' premises are being put under the *Logan Valley, Schwartz-Torrance, Lane* and *Taggart* concepts? We hold that the owner of a privately owned shopping center is not required to permit the unconsented use of his property for unrelated First Amendment activities by others for the following reasons:

I.

THE DESIRED USE IS NOT DIRECTLY RELATED IN ITS PURPOSE TO THE USE TO WHICH THE SHOPPING CENTER IS ACTUALLY BEING PUT.

Appellants would have us interpret the phrase "consonant with the use to which the property is actually put" to mean "consistent with the facilities available" or "consistent with the physical structure of the shopping center." This test is overbroad. There may be "facilities available" in a market, a department store, a hospital, a hotel, a private home or the waiting room of a business office. We interpret the phrase "consonant with the use to which the property is actually put" to mean some use directly connected with that particular property. Thus, in picketing cases, the use by others of the property involved is allowed for First Amendment purposes because that is the place which is the object of protest. This is a purpose directly related to the business of the shopping center. In addition, in picketing cases, there is the preferred status of picketing under Federal and California law as pointed out in *Schwartz-Torrance.* The reason *Logan Valley* and *Schwartz-Torrance* allowed picketing on the shopping center was that to do otherwise would be to immunize the shopping center, by the use of its large parking lot from any on-the-spot criticism of the economic practices of the businesses therein. This would deprive the union of the opportunity to conduct its picketing at the most effective point of persuasion—the place of the business involved. The concept of criticism is explicit in *Shwartz-Torrance* and *Logan Valley.* There, the target of criticism was within the shopping center. In the instant case, there is no attempt to criticize Homart or any store therein.

Among other contentions, appellants contend that First Amendment rights may be exercised at every location

wherein they have been "traditionally" exercised. Union picketing and other protest communications have been "traditionally" exercised at the establishment whose policies are being protested. No such situation exists herein for these appellants merely wish to engage in general, unrelated First Amendment activities on respondents' property. The concept of "tradition" is dangerously vague. Most retail, commercial establishments are open to the public and in a literal sense places of "traditional" market activity. Yet, even appellants do not contend that they can carry on their unconsented activities in a grocery store or a meat market. While the soliciting of names on an anti-pollution initiative is a highly commendable activity, it can by no stretch of the imagination be construed as being directly related to the business of the shopping center. We cannot find that the solicitation of signatures for this initiative measure is generally consonant with or directly related in its purpose to the use to which the Inland Center is actually put.[1]

II.

THE AVAILABILITY OF OTHER EFFECTIVE ALTERNATIVE CHANNELS OF COMMUNICATION.

The record is clear that in the opinion of the appellants the shopping center is the most desirable place in which to solicit signatures for an initiative petition. We feel that the record supports this view. It is an attractive, pleasant and convenient place in which to communicate

1. This limitation on the *Marsh* principle was recognized by Judge Henry J. Friendly in *Powe* v. *Miles*, 407 F. 2d 73 at p. 80, where Judge Friendly refers to *Logan Valley's* extension of the principles of *Marsh* "in the context of union picketing of one of the enterprises located there."

their message.[2] However, alternative methods of solicitation and communication are available as pointed out in the statement of facts above. It was the very absence of such channels in *Logan Valley* which caused the court in that case to find that the state substantially hindered the communication of ideas which petitioner in that case sought to express. (*Amalgamated Food Employees' Union, Local 590* v. *Logan Valley Plaza, Inc., supra,* 391 U. S. 308, 323 [20 L. Ed. 2d 603, 88 S. Ct. 1601].) In *Schwartz-Torrance,* alternatives available were such that they would involve the danger of traffic tie-ups, confusion as to the object of the picketing and the requirements of larger signs and more pickets. This brings us back to the fact that every case decided to date involving shopping centers has been a picketing case. For other First Amendment activities such as those proposed by appellants in this case, the parties can conduct their programs, carry on their communications, disseminate their information and make their solicitations on publicly owned streets, sidewalks, parks, etc.—even though these may not be as desirable as respondents' property. As a matter of rather obvious public policy, First Amendment rights of communication of ideas by word of mouth should be exercised on public property. For an exception to this rule, a strong showing of need must be made. No such showing has been made in this case. To the contrary there are available other effective (although admittedly not as desirable) alternative channels of communication.

2. One is reminded of the contention made in *Adderley* v. *Florida, supra,* that the protesters there had a right to stay on jail property because the area was "particularly appropriate." To this contention, the court responded, "Such an argument has as its major unarticulated premise the assumption that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please. That concept of constitutional law was vigorously and forthrightly rejected in two of the cases petitioners rely on, *Cox* v. *State of Louisiana, supra,* at 554-555 and 563-564, 85 S. Ct. at 464 and 480. We reject it again."

III.

THE POTENTIAL FOR OBSTRUCTION AND INTERFERENCE OCCASIONED BY THE EXERCISE OF UNRELATED FIRST AMENDMENT RIGHTS IN A SHOPPING CENTER WARRANTS A DENIAL OF THOSE RIGHTS THEREON.

Even when dealing with public property, the exercise of First Amendment rights may be regulated where such exercise will unduly interfere with the normal use of the public property by other members of the public with an equal right of access to it. (*Taggart* v. *Weinackers, Inc., supra,* 90 S. Ct. 876, 877; *Amalgamated Food Employees' Union, Local 590* v. *Logan Valley Plaza, Inc., supra,* 391 U. S. 308, 320-321 [20 L. Ed. 2d 603, 88 S. Ct. 1601].)

Appellants point out that in *In re Hoffman, supra,* 67 Cal. 2d 845, and *Wolin* v. *Port of New York Authority,* 392 F. 2d 83, the courts expressly rejected the two tests previously discussed, i.e., that the proposed use must be related to the business of the property involved and that there not be available other effective channels of communication. However, *Hoffman* and *Wolin* are clearly distinguishable on their facts. In each case there was leaflet distribution concerning the United States involvement in Viet Nam. It is true that in neither was the activity related to the business of the property owner and in both there were available other effective channels of communication. However, the physical facts of the property involved create a clear distinction between these cases and the instant case. In *Hoffman,* the activities were being conducted in the Los Angeles Union Railroad Station which was then a great railway terminal serving three major railroads. In *Wolin,* the site of the activities was an immense bus terminal covering a full city block and serving over 200,0000 people per day. In these cases the court permitted the

unrelated First Amendment activities, pointing out that noise and confusion were characteristic of the normal operation of a railroad station or bus terminal, that the very nature of the operations were such that the proposed activities could in no way interfere with the normal use of the property or with the normal orderly carrying on of the business conducted therein and that the property involved was an appropriate place for expression of views. The court pointed out in *Wolin*, particularly, that the character and function of the place chosen for the exercise of First Amendment rights is an important factor affecting the limits of tolerable disruption and that while the Supreme Court had protected loud and boisterous conduct on a street used as a state house driveway during the day (*Edwards* v. *South Carolina*, *supra*, 372 U. S. 229 [9 L. Ed. 2d 697, 83 S. Ct. 680]) that similar activity would not receive the same treatment if it were conducted in other places where "order and tranquility of a sort entirely unknown to the public streets are essential to their normal operation." (*Wolin*, *supra*, fn. 8, p. 90.)

Here, we feel that it is obvious that the normal activities carried on at the Inland Center can hardly be compared to those carried on in the New York Bus Terminal or the Los Angeles Union Station.

The normal orderly carrying on of business in a shopping center demands an entirely different standard of order and tranquility than the disorder, confusion and tumult to be found in a bus terminal or railroad station. The level or degree of tolerable interference between the two types of activities is so great that one set of rules cannot be made to apply to both situations.

The possibilities of the results of unrelated First Amendment activities for religious, charitable, political, social and economic purposes being carried on in the malls or on the walks, aisles, driveways and parking areas of shopping

centers (or for that matter of supermarkets or department stores) stagger the imagination. If appellants can do what they propose to do in this case, other obviously have the same right. One card table is a minimal obstruction, thirty or forty would destroy business and unduly interfere with the normal use of the property by other members of the public.

Appellants suggest that they be allowed to conduct their unrelated First Amendment activities subject to "reasonable regulations." When one contemplates the tens of thousands of shopping centers, large and small, and the large number of individuals or groups who may wish to use these premises for the exercise of unrelated First Amendment rights thereon, the problem of creating "reasonable regulations" for each case assumes epic proportions. The shopping center (or the supermarket) is "where the action is" as the citizens leave the decaying, traffic congested centers of our towns and cities and flock to the modern shopping centers with their ease of parking and other conveniences. However, merely by reason of this historic accident, we cannot turn shopping centers into miniature Pershing Squares, Union Squares or Hyde Parks. History, some of it of recent origin, has shown the irresponsibility of certain groups in exercising cherished First Amendment rights of freedom of communication and expression. Municipalities are peculiarly equipped to promulgate "reasonable regulations." But a holding that anyone may exercise his unrelated First Amendment rights on a shopping center subject only to "reasonable regulations" presents to the owners of the shopping centers policing problems of staggering proportions.

In any case such as this there is a clash between two conflicting constitutional rights—the right of the property owner to run his business without interference and the right of others to engage in First Amendment activities.

The court must accommodate these constitutional rights and look to each case to determine wherein the line has to be drawn. As the court pointed out in *Logan Valley*, a balance must be obtained which seeks to neither "substantially hinder—the communication of idea" nor "significantly interfere . . . with the use to which the [private] property is being put by both respondents and the general public." (*Logan Valley, supra*, p. 323.) Due to the brevity of the incident and the exemplary behavior of all connected with it, obstruction and interference in the instant case were minimal; nevertheless, they were "appreciable," (*In re Hoffman, supra*, fn. 6, p. 852), and the potential for obstruction and interference is clear.

We feel that the tests set forth above strike this balance.[3]

Applying the above standards to the facts in the instant case, the decision of the lower court was proper and the judgment of that court denying the injunction is affirmed.

GARDNER, *J.*

We concur:

KERRIGAN, *Acting P. J.*
TAMURA, *J.*

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3. We are aware of a three-sentence pro curiam opinion of the Supreme Court of the State of Minnesota which reversed a trespass conviction of individuals who had entered a shopping center for the purpose of distributing a pamphlet or tract on behalf of the candidacy of certain persons in a political campaign. The court said, "On May 20, 1968, the case of *Amalgamated Food Employees' Union Local 590* v. *Logan Valley Plaza, Inc.* [citation omitted] was decided by the Supreme Court of the United States. The decision is controlling over the facts involved in the case now before us. On the basis thereof the convictions must be reversed." (*State* v. *Miller*, 280 Minn. 566, 159 N. W. 2d 895.)

All we can say is that for the reasons stated in this opinion we must respectfully disagree with the simplistic approach taken by that court.

APPENDIX D.

OPINION OF THE CALIFORNIA SUPERIOR COURT, NOVEMBER 14, 1969.

SUPERIOR COURT OF THE STATE OF CALIFORNIA,
For the County of San Bernadino.

ROGER JON DIAMOND, et al., etc., *Plaintiffs,*
vs.
FRANK BLAND, et al., etc., *Defendants.*
No. 149671.

REPORTER'S TRANSCRIPT OF PROCEEDINGS.

Before HON. JAMES E. CUNNINGHAM, SR., *Superior Court Judge,*

Department X, San Bernadino, California.

November 14, 1969.

The Court: Gentlemen, as we all know, for the past fifty years there has been a constant erosion of property rights. First of all, in favor of public rights such as health and safety laws. Next, licensing ordinances and after that zoning ordinances. For the past fifteen years there has been a considerable amount of decisional law diminishing property rights in favor of personal or individual rights including First Amendment Rights as have been referred to. But in all of the cases determining the validity of of these erosionary laws on property rights, the Court of

necessity has had to balance the equities, so to speak, had to weigh the prejudice to the property right to the greater gain of the public or individual right.

As the law now stands many, many things are permitted on what is public property: Demonstrations, solicitations, passing out of leaflets. Of course, the first was the picket line in front of private property. How, many of these things merchants would like to be free of, many of these restrictive type things. Consequently, merchants have invested tremendous sums of money for leasehold interests in order to carry out what the Court feels is the moral obligation of the merchant to protect his customer from annoyance or harassment, jostling. In other words, he has a need to afford comfort to his prospective customer. Many merchants have found that when they locate their businesses contiguous to public property, they cannot do these things they would like to do for the comfort and well being of the customer and that is the reason, in great measure, that the shopping center movement has been so great in the post-Korean years. Plus the fact that the Court takes judicial knowledge that urban areas have been blighted. It is difficult for any one merchant to improve appreciably his place of business because he doesn't know what his neighboring business people will do or whether they will also invest the money. So what with the blighting of the urban area, their deterioration, the more permissiveness of conduct on the public sidewalk and street that is injurious to his business, so he feels, has caused him to band together with his other merchants and move into a completely privately owned shopping center. Evidently, though, when it came to a strike dispute, the merchant wasn't able to get away with his private property argument. In the Logan case the pickets were permitted on private property, shopping center property, but there the Court was very careful to point out that there was a privy, there was a causal connection between the permitting

of the pickets and the diminution of private property rights because it was the only way that the union in exercising its heretofore established right to picket, could point out the alleged offending employer. The Court gave no indication that for any other purpose it would tear down or destroy the last vestiges of the capitalistic system and also a constitutional right to have the peaceful enjoyment of real property or leasehold interest therein.

In our case at Bar, the Court is of the opinion that the Logan decision of the United States Supreme Court has no applicability because I find no privy between the plaintiff in his attempt to induce the merchants' customers to sign his petition as having any relationship whatsoever with the merchants' right to do business.

The shopping center has demonstrated its ability to operate a more desirable entity for the conduct of mercantile business by virtue of the acceptance it has received from the public. The Court heard evidence today and took judicial knowledge of the fact that one of the greatest people getters in San Bernardino County was the Shopping Center and why are the people going to the shopping center in such droves? A partial reason is that there is some redevelopment taking place in what was formerly the downtown section of San Bernardino but that isn't the sole reason. The people are traveling, according to the testimony, from a hundred miles away, from Barstow and they are coming down because the shopping public, first of all, wants value for the shopping dollar and wants and has demonstrated its desire for an environment to shop in that is pleasant, clean and interesting. I might even say entertaining because promotions have evidently been popular because of their multiplicity. So, in our case when the Court balances the prejudice to be done to the merchant as against the gain to be obtained by the plaintiff, I feel the greater weight is on the side of the defendants.

In concluding, let me give you the Court's answer to one thing that was pointed up here during the trial and that is, to wit: The plaintiffs First Amendment Rights, the right to circulate a petition in accordance with the law providing for the initiative is being denied him because unless he can get into the shopping center where he can meet large crowds of people, he cannot complete his petition within the time prescribed by law to complete it.

Well, gentlemen, we have a Legislature in the State of California that is fully attuned, in my opinion, to the wishes and the desires of the people. If the shopping centers, because petitions could not be circulated there, were preventing the initiative from being effective and which it always should be because that is a great American right that we have, then, I would say we should prevail upon the Legislature to extend the time within which to collect the signatures so that they might be obtained where the Courts have already determined petitions might be circulated and signatures obtained. That would take thirty days or sixty days longer to do it on public property such as the street corner. Change the law if necessary but don't infringe again on another property rights that have in the past ten years, as I initially stated, suffered tremendous erosion.

The prayer of the petition for temporary injunction denied as to all named defendants. Both parties to bear their own costs. The Court will be in recess.

Mr. Gresham: Thank you, your Honor.

The Court: Gentlemen, since making my order denying the request for the temporary injunction I understand you have had some conversation and wish to enter into a stipulation?

Mr. Diamond [for Plaintiffs]: Yes, your Honor. The stipulation will be that your order covers both the application for the preliminary injunction as well as the permanent

injunction and that your order was denial of both applications and that the order is final for purposes of an appeal.

The Court: Do you join in the stipulation?

Mr. Gresham [for Defendant Homart Development Co.]: Yes, your Honor.

The Court: The other two attorneys are not present but I think you might agree that they are not the real parties in interest as is the shopping center per se and the plaintiffs.

APPENDIX E-1

PETITION FOR STAY OF REMITTITUR, JANUARY 5, 1971.

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

ROGER JON DIAMOND, et al.,
Plaintiffs-Appellants,
vs.
FRANK BLAND, etc., et al.,
Defendants-Respondents.

L. A. 29803

PETITION FOR STAY OF ISSUANCE OF REMITTITUR AND ORDER THEREON.

TO: THE HONORABLE SUPREME COURT OF THE STATE OF CALIFORNIA:

1. Plaintiffs in the instant action sought an injunction restraining this defendant, among others, and its agents, from annoying, bothering, molesting or injuring plaintiffs, their agents and persons soliciting signatures on petitions and disseminating information relative thereto on the premises of the Inland Center, provided that such activities were orderly and consisted only of the solicitation of signatures and the dissemination of information relative to the petition.

2. Following trial, the Superior Court declined to grant the injunction which plaintiffs sought. This ruling was upheld on appeal by the Fourth District Court of Appeal, Division Two.

3. This Honorable Court granted hearing and now by its opinion has ordered that the relief sought by plaintiffs be granted, subject to reasonable regulations.

4. Petitioner believes the ruling of this court to be in error and will petition for a writ of certiorari in the United States Supreme Court (See Declaration of Allen B. Gresham) within the statutory time period.

5. It is respectfully submitted that pending action by the United States Supreme Court on said petition, the public interest is best served by mintaining the status quo. Such action will avoid confusion and possible conflict which may grow out of a situation in which the regulations adopted pursuant to the ruling of this court could later be rendered unnecessary by action of the United States Supreme Court. The attendant uncertainty contains the seeds for ill will and potential violent behavior.

6. It is also respectfully submitted that should the United States Supreme Court reach a contrary conclusion to this Honorable Court, the stay of issuance of the remittitur thereby maintaining the status quo will eliminate the necessity for litigation concerning the reasonableness of the regulations which may be adopted by one or more of the multitudinous shopping centers throughout the State of California.

7. Petitioner has already received a request to use the mall for solicitation purposes (see letter dated December 21, 1970 from Roger Jon Diamond—Exhibit "A") so it is certain these problems will arise.

8. The relief sought herein is consistent with the procedure provided in the Federal Rules for Stay of Mandate and is reasonable and appropriate both as to application and time period involved.

9. The opinion of this Honorable Court was filed on December 16, 1970 and will become final 30 days thereafter.

The Clerk, unless otherwise ordered, will issue the remittitur upon such decision becoming final.

WHEREFORE, it is respectfully submitted that this Honorable Court stay the issuance of the remittitur in this action pending action by the United States Supreme Court on the petition for writ of certiorari, said stay to continue until final disposition by the United States Supreme Court in the event certiorari is granted but to terminate 30 days after notification that it has been denied.

Dated: January 5, 1971.

Lederer, Fox and Grove and
Lonergan, Jordan, Gresham
& Varner,

By /s/ Allen B. Gresham,
Allen B. Gresham,
Attorneys for Petitioner, Homart Development Co.

ROGER JON DIAMOND
Attorney at Law
15415 Sunset Boulevard
Pacific Palisades, California 90272

454-1351

December 21, 1970

Allen B. Gresham, Esq.
Lonergan, Jordan & Gresham
398 West Fourth Street
San Bernardino, California 92401

Re: *Diamond* v. *Bland*
L. A. 29803

Dear Mr. Gresham:

I am sure that you are aware of the Supreme Court's decision filed on December 16, 1970, which reversed the trial court's decision in this case, and which holds that my clients, including People's Lobby, Inc., have a right to exercise First Amendment rights on the premises of Inland Center in San Bernardino, owned by your client, Homart Development Company.

As you recall, this case arose last year during my clients' unsuccessful campaign to secure enough signatures on two anti-pollution initiative petitions in order to qualify it for the State ballot.

The People's Lobby has filed a new anti-pollution initiative petition, a copy of which I have enclosed for your convenience. Accordingly, the People's Lobby once again desires to use the premises of Inland Center in order to secure signatures on the petitions and in order to engage in related activities. Furthermore, in addition to activities directly related to the initiative petition, the People's

Lobby wishes to conduct other activities on the premises of Inland Center with respect to matters of air pollution. For example, People's Lobby wishes to hand out literature and distribute other material. Of course, the People's Lobby's representatives will conduct themselves in an orderly manner and will in no way obstruct any business of the Center.

I am advising you of these facts just to let you know what the intentions of the People's Lobby are. We intend to come onto the premises as soon as the remittitur issues in the above-captioned matter.

We would be glad to consider any reasonable regulations that you would like us to follow in connection with these activities. Let me hear from you as soon as possible.

Very truly yours,

/s/ Roger Jon Diamnod
Roger Jon Diamond

RJD/rr

enclosure

APPENDIX E-2.

DECLARATION IN OPPOSITION TO PETITION FOR STAY OF REMITTITUR.

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA.

ROGER JON DIAMOND, et al.,
Plaintiffs-Appellants,
vs.
FRANK BLAND, etc., et al.,
Defendants-Respondents.

L. A. 29803.

Appeal from the Superior Court of the County of San Bernardino HONORABLE JAMES E. CUNNINGHAM.

DECLARATION OF ROGER JON DIAMOND IN OPPOSITION TO PETITION FOR STAY OF ISSUANCE OF REMITTITUR.

I, Roger Jon Diamond, declare as follows:

I am an attorney admitted to practice in California, and am one of the plaintiffs and appellants in this case. I, along with two other persons, was a proponent of two initiative petitions which were involved in this case. These two initiative petitions were attached to the complaint in this action as Exhibits "B" and "C" (Clerk's Transcript, pages 9 through 24). The two initiative petitions would have appeared on the November 3, 1970, California General Election Ballot had they received the required number of signatures. Many more signatures would have been secured

on these petitions had the trial court in this action not denied the relief requested.

In December 1970, I and three other persons, as proponents, filed a new anti-pollution initiative petition with the Secretary of State and Attorney General, and on December 7, 1970, the Attorney General prepared and returned to me and the other proponents the title and official summary of the initiative. The People's Lobby, Inc., sponsors of the two previous initiative petitions and a plaintiff-appellant here, is once again sponsoring this initiative petition drive. I have attached copies of the new initiative petition to this declaration for the convenience of the Court.

According to the Elections Code, I and the other proponents, and the People's Lobby, Inc., will have 90 days from December 7, 1970, in which to collect the necessary signatures of registered voters (approximately 325,000). In other words, the petitions with the required number of signatures must be filed by March 7, 1971. The law, however, does provide for an additional 60-day supplemental period beyond the first filing date.

I, the other proponents of this initiative, and the People's Lobby, Inc., wish to take advantage of this Court's ruling in order to have access to Inland Center for the purpose of gathering signatures on the new anti-pollution initiative petition.

If this Honorable Court grants the Petition to Stay the Issuance of the Remittitur then plaintiffs-appellants will be denied the fruits of their victory.

In addition to the present initiative petition now being circulated, it is my intention and the intention of People's Lobby, Inc. to file, sponsor and circulate still additional initiative petitions in the future, as well as exercise other kinds of activities also protected by the First Amendment

to the United States Constitution. That is, my opposition and the opposition of other plaintiffs-appellants in this case to the Petition for Stay of Issuance of Remittitur is not based solely on the fact that a new initiative petition is being circulated, but upon the further fact that other activities (with no time limit, such as distribution of anti-pollution literature and other kinds of literature) will also be undertaken by People's Lobby, Inc., on the premises of Inland Center, which is, as the Court recognized, the largest shopping center in the County of San Bernardino.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: January 7, 1971, at Pacific Palisades, California.

/s/ Roger Jon Diamond,
Roger Jon Diamond.

APPENDIX E-3.

ORDER OF THE CALIFORNIA SUPREME COURT, JANUARY 14, 1971.

L. A. No. 29803.

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA IN BANK.

DIAMOND, et al.,

VS.

BLAND, AS SHERIFF, ETC., et al.

Application for stay of issuance of remittitur DENIED. This order is final forthwith.

Filed Jan. 14, 1971. G. E. Bishel, *Clerk.*

/s/ Not Legible,

Deputy,

/s/ Wright,

Chief Justice.

APPENDIX E-4.

JUDGMENT, JANUARY 28, 1971.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

For the County of San Bernardino

ROGER JON DIAMOND, WILLIAM DUXLER, PEOPLE'S LOBBY, INC., *Plaintiffs and Appellants,*

vs.

FRANK BLAND, SHERIFF OF SAN BERNARDINO COUNTY, ET AL., *Defendants and Respondents.*

No. 149671.

FINAL JUDGMENT (Permanent Injunction).

To: Frank Bland, Sheriff of San Bernardino County; Louis J. Fortuna, Chief of Police of City of San Bernardino; Lowell E. Lathrop, District Attorney of San Bernardino County; James Lambert; C. H. Barret; Al C. Ballard, Mayor of City of San Bernardino; Homart Development Company, a corporation:

Upon issuance of the remittitur by the Supreme Court with respect to its written opinion in this case filed on December 16, 1970,

IT IS HEREBY ORDERED that defendants Frank Bland, Sheriff of San Bernardino County; Louis J. Fortuna, Chief of

Police of City of San Bernardino; Lowell E. Lathrop, District Attorney of San Bernardino County; James Lambert; C. H. Barret; Al C. Ballard, Mayor of City of San Bernardino and Homart Development Company, a corporation, be, and they are hereby permanently enjoined and restrained from: Interfering in any way with the right of Roger Jon Diamond, William Duxler or the People's Lobby, Inc., to circulate initiative petitions and to engage in other peaceful and orderly First Amendment activities on the premises of the Inland Center.

Dated: Jan. 28, 1971.

James E. Cunningham, Sr.,
Judge.

APPENDIX E-5.

ORDER OF THE CALIFORNIA SUPERIOR COURT, JANUARY 28, 1971.

SUPERIOR COURT OF THE STATE OF CALIFORNIA,

For the County of San Bernardino.

ROGER JON DIAMOND, WILLIAM DUXLER, PEOPLE'S LOBBY, INC., *Plaintiffs,*

vs.

FRANK BLAND, et al., *Defendants.*

No. 149671.

ORDER STAYING EXECUTION OF JUDGMENT.

The motion of defendant Homart Development Company for an Order staying execution having come on regularly for hearing before the undersigned this 28th day of January, 1971 at the hour of 10:00 A. M. upon notice duly and regularly served and plaintiffs appearing by Roger Jon Diamond, their attorney and defendant Homart Development Company appearing by Lonergan, Jordan, Gresham & Varner by Allen B. Gresham, its attorneys, and evidence, oral and documentary, having been presented and the matter having been argued and submitted and good cause appearing therefor;

IT IS HEREBY ORDERED that defendant's motion be and the same is hereby granted.

IT IS FURTHER ORDERED that execution of judgment herein be stayed for a period of 30 days from the date of this order.

Dated: Jan. 28, 1971.

/s/ James E. Cunningham, Sr.,
James E. Cunningham, Sr.,
Judge, Superior Court.

APPENDIX E-6.

ORDER OF THE CALIFORNIA SUPERIOR COURT, FEBRUARY 26, 1971.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

For the County of San Bernardino

ROGER JON DIAMOND, WILLIAM DUXLER, PEOPLE'S LOBBY, INC.,
Plaintiffs and Appellants,

vs.

FRANK BLAND, SHERIFF OF SAN BERNARDINO COUNTY, ET AL.,
Defendants and Respondents.

No. 149671.

STIPULATION AND ORDER THEREON.

Plaintiffs and Defendant Homart Development Co. (Homart), by their respective attorneys, stipulate and agree as follows:

1. Pursuant to the decision in this case by the California Supreme Court filed on December 16, 1970, judgment was entered by this Court on February 1, 1971. The execution of judgment was stayed for good cause shown for a period of thirty days by order of this court dated January 28, 1971.

2. Homart intends within the time prescribed by law to file a petition for writ of certiorari with the United States Supreme Court to review the decision of the California

Supreme Court. Plaintiffs' position with respect to the petition is that they do not oppose the grant of certiorari because they believe the decision of the California Supreme Court is, with one exception, correct, and should be of national effect. The one exception is the California Supreme Court's implication that *Homart* may impose "reasonable regulations" on the exercise of First Amendment rights at Inland Center. Plaintiffs believe that this is an erroneous proposition of law.

3. For the reasons stated in paragraph 2, Homart and plaintiffs agree, pursuant to California Code of Civil Procedure section 681a, to entry of an order continuing the stay of execution of judgment, without posting of a stay bond, until March 16, 1971 to permit the filing of a petition for writ of certiorari, and in the event the petition is filed, until final disposition thereof by the United States Supreme Court.

February 26, 1971

/s/ Roger Jon Diamond
Roger Jon Diamond
Attorney for Plaintiffs

February 26, 1971

/s/ Allen B. Gresham
Allen B. Gresham of Lonergan, Jordan, Gresham & Varner
Attorneys for Defendants

ORDER.

Pursuant to the above Stipulation, and for good cause shown, IT IS SO ORDERED.

Dated: February 26, 1971

/s/ James E. Cunningham, Sr.,
Judge.

APPENDIX F.

OPINION OF THE RHODE ISLAND SUPERIOR COURT IN HOMART v. FEIN, AUGUST 6, 1970.

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS.

Kent, Sc. Superior Court.

HOMART DEVELOPMENT COMPANY,

vs.

DANIEL FEIN, JOSEPH TRAUGOTT, JOHN POWERS.

70-275.

August 6, 1970.

(P. M. Session.)

LAGUEUX, *J.*: This matter is before the court on a prayer for a temporary injunction by Homart Development Company against Daniel Fein, Joseph Traugott, John Powers and the Rhode Island Socialist Workers Party. The claim is that the defendants individually as candidates for national and state office under the banner of Rhode Island Socialist Workers Party have entered onto premises owned by the plaintiff and leased by it to tenants, for the purpose of soliciting signatures on primary nomination papers and exhorting customers of these tenants to support their views and that they have been denied permission to use these premises for that purpose and that they have indicated that they will continue to use the premises for that purpose unless enjoined temporarily and permanently in accordance with the prayer. So the case is before the court now on a request for a temporary injunction.

The basic test which is applied in determining whether a temporary injunction shall issue is whether or not there is a reasonable probability that the plaintiff will prevail at the hearing on the merits. This case does not present many factual disputes. It essentially presents a basic question of law. However, I think it's necessary for the court to make some preliminary findings of fact. The premises owned by the plaintiff consist of some forty-five acres of land in the city of Warwick containing some seventy-three stores which are leased out. The unusual feature of this shopping center is that it is essentially under one roof in two levels with a minor exception; namely, there is a Sears Auto store in another location on the premises and another minor building. The parking area is very large. This shopping area is open to the public between 9:30 in the morning and 9:30 in the evening, six days a week, and on Sundays some of the businesses in the area are open although not all. Probably the majority of them are not open on Sunday. The testimony is that on an average day 18,000 people attend the area for various purposes. The plaintiff, Homart Development Company, which operates eight of these centers throughout the country, has a national policy and I find that they have a local policy, non-discriminatory in effect, that no political candidates will be allowed to use their premises for solicitation purposes. That means that no candidates will be allowed to use their premises for solicitation of signatures, votes or other campaign purposes. Plaintiff also has a general policy not to allow outside groups, and by outside groups I mean groups other than their own tenants, to use the premises unless the use will be for a display or some sort of an activity which will be of some attraction to the general public, attracting people to the area. Examples of that policy in effect have been for example, to allow use of the premises for art exhibits by gifted children. Presumably this will attract people who are interested in

looking at these things and maybe also, in the process, bring them into some of the stores. Camping exhibits and ecology exhibits were conducted and even in one instance, it allowed a radio station to conduct a program whereby people could drop by and leave off a gift for soldiers in Viet Nam.

The defendants, Daniel Fein, Joseph Traugott, and John Powers, are candidates for the offices of United States senator, governor, lieutenant governor in the State of Rhode Island (not necessarily in that order) under the aegis of the United States Socialist Party. Their purpose for using the premises in question is to secure signatures on their nomination papers so that they may secure the necessary five hundred to place them on the ballot in November and also to expound on their political views in an effort to solicit support in the coming election in the event they are on the ballot. Also the testimony indicates, if they are on the ballot, they intend to use the premises at some later time for campaigning purposes; namely, to meet people, pass out leaflets and to expound their views. Their reason for wanting to use this particular area is that it's the most convenient place to meet a lot of people, a lot of Rhode Islanders, to secure signatures and to secure support. The defendants used the premises on three occasions in late July 1970. Some or all used it on all three occasions. On one occasion they used it for approximately one hour and were asked to leave. The area they used on that occasion was marked on an exhibit, Plaintiff's Exhibit "1" in ink. There was testimony that they returned on another occasion and used the other side of the building, were asked to leave and left and that they returned on a third occasion and at that time were served with a temporary restraining order.

The defendants assert, in substance, that they can use these premises for these purposes because of the guarantee

of the right of free speech and to assemble in the First Amendment of the United States Constitution. I think it may be well to point out that the right of free speech and all first amendment rights are not absolute and that they may be subject to some regulation at times. There are many examples of this. These rights may also come in conflict with other rights equally well guaranteed by the United States Constitution. For example, in the courtroom on the criminal calendar we continually have the problem of balancing the first amendment right of free press against the right of the particular defendant bfore the court to a fair trial. In the area of free speech, there have been limitations imposed by the United States Supreme Court enunciating a clear and present danger doctrine. Limitations are imposed by libel laws enacted by legislatures and by the common law. A person may be free to speak but if he speaks in a certain way he may be criminally or civilly liable, so that the right of free speech is not absolute and this is particularly so when the right conflicts with another constitutional right. We have here involved another constitutional right and that is the right to use one's own property as one see fit subject to reasonable regulations made in accordance with due process of law. The due process clause of the United States Constitution is applicable both to the states and to the federal government. It guarantees not only life and liberty but property. I should note here that this is not a discrimination case. There is no evidence before the court that these particular defendants have been discriminated against by application of any policy enunciated by the plaintiffs. In other words, there is no evidence that other political parties, other candidates, have been allowed to use these premises to solicit signatures or for campaign purposes.

The crux of the situation is that the Midland Mall in Warwick is private property. Some people may say it's

quasi public property. The use of the word "quasi" to me is meaningless. It's a means of covering up or sloganizing the basic concepts and ideas, which must be investigated in order to make a proper determination of the merits of a controversy such as this.

This property is private. However, the public is invited, but the public is not invited for all purposes but rather for a limited purpose—namely, to shop and to perform functions incidental to the operation of the center. In other words, the public is invited to come upon the Midland Mall for reasons directly connected with the profit-making motives of the owners of the mall. The presence of the defendants there is not pursuant to that invitation. Defendants are there for their own private purposes and not for any purpose directly related to the reason that this shopping center exists.

Cases have been cited to me by counsel for the defendants and discussed by both counsel, to attempt to sustain the proposition that the defendants have a right to be there, to speak there, to solicit support there from customers. It would be well to simply discuss these cases very briefly. The landmark case is *Marsh* v. *Alabama* where the United States Supreme Court held that in a company-owned town where there were no other reasonable alternatives available, a Jehovah witness could not be prevented from disseminating literature in accordance with that person's religious belief. That case is not applicable to the situation here. We are not dealing with a company-owned town. We're not dealing with a situation where there are no reasonable alternatives. The other landmark case is the *Logan Valley Plaza* case also decided by the United States Supreme Court, which stands for the proposition that in labor disputes union people interested in that labor dispute can picket a lessee in one of these

shopping areas. I have no dispute with that case. I think it's well decided but again it is not applicable to this situation. The two other federal cases cited to me by Mr. Stanzler, I find inapplicable. The case of *Tanner* v. *Lloyd* which is a district court case in Oregon was also cited to the court. I don't find the court's decision convincing. I am impressed by the reasoning in the case of *Diamond* v. *Bland* decided by the Court of Appeals for the 4th District, 2nd Division, State of California which was filed on May 25, 1970. A copy of that decision was made available to me by Mr. Wells and a copy of that decision will be filed with the records of this case in the event that it is not reported elsewhere. It would serve no useful purpose for me to go over all the points made in that decision by the three judges who decided it. I would probably come out second best in trying to articulate their views which I agree with. They have done the subject justice.

An important point to keep in mind is that there were reasonable alternatives available to these defendants to pursue their political hopes and aspirations. There are other places where they can solicit signatures. They can campaign in other shopping centers when given permission by the owners which has been given to these defendants in the past. The owners of real property and shopping centers can decide for themselves. There are public parks available. There are sidewalks, public areas of all sorts and house to house canvassing available. This court is not a stranger to political campaigning. When Mr. Fein was on the stand I was reminded that six years ago I was a candidate for the office which he is now seeking and I recall campaigning all over the state but always by permission of those who owned private property.

The consequences of allowing this conduct in this particular case I think would be staggering. If, at this time,

the court allowed these three individual defendants and this particular political party to use the premises at the Midland Mall for soliciting signatures and for campaigning purposes then certainly all other candidates for office would be privileged to do likewise even at the same time. It could be chaotic in that area. The court here must indulge in a balancing process. It must balance one constitutional right against another. It must balance the constitutional right to freely speak and to assemble for redress of political grievances against the policy of the plaintiff which is non-discriminatory in nature and effect, which it chooses to promulgate for the protection of its legitimate business interest and protectable property rights. The defendants first amendment rights can be exercised elsewhere as effectively as it could be exercised on plaintiff's premises. It may not be as convenient but the final result can be as effective. Therefore, the court is striking a balance and both rights are allowed to co-exist. The temporary injunction prayed for may issue enjoining the defendants from soliciting signatures for their nomination papers on the premises of the plaintiff and also from campaigning for political office on those premises. Present an order.

(Adjourned.)